

Supreme Court, U. S.
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No. 77-1145

In the Supreme Court of the United States

OCTOBER TERM, 1977

LOUIS VERNELL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

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Pursuant to 28 U.S.C. 2255, petitioner seeks to set aside his convictions for failure to file income tax returns for five successive years.

After a jury trial in the United States District Court for the Southern District of Florida, petitioner, an attorney, was convicted of failing to file income tax returns for the years 1967 through 1971, in violation of 26 U.S.C. 7203. It was stipulated at trial that petitioner was required by law to file tax returns for each of the years, that he did not do so until May 1973, after the Treasury agents' investigation had begun, and that his gross income was substantially that charged for each year in the information, *i.e.*, \$72,826 in 1967, \$42,086 in 1968, \$34,275 in 1969, \$50,774 in 1970, and \$44,774 in 1971 (R. 29, 47,

74).¹ During the investigation petitioner advised the agents that he had been too busy trying to make money to file the returns (R. 59, 61). He was sentenced to concurrent nine-month terms of imprisonment and fined \$5,000 (Pet. 7). The court of appeals affirmed without opinion (Pet. App. 10), and this Court denied certiorari (423 U.S. 1014).

In August 1975, petitioner filed a motion for new trial on the ground of newly discovered evidence, alleging that the government had suppressed exculpatory evidence, had introduced false testimony and records into evidence, and had improperly monitored telephone conversations between petitioner and his accountant and attorney (Pet. App. 14-18). Petitioner asserted that these improprieties related to the alleged grants of extensions of time by the Internal Revenue Service for the filing of each of the five tax returns in question (*ibid.*). The district court denied petitioner's motion (Pet. App. 19), and the court of appeals summarily affirmed (Pet. App. 21).

In February 1976, petitioner brought the present Section 2255 proceeding renewing the allegations of his previously denied motion for a new trial (Pet. App. 22-39). The district court denied relief (Pet. App. 40-49), and the court of appeals affirmed *per curiam* (Pet. App. 1-2). The court of appeals stated: "The grounds raised in the instant §2255 petition have been previously decided by both the district court and this court in petition for rehearing, motion for a new trial, and the direct appeal therefrom" (Pet. App. 2).

¹"R." refers to the original record filed in the court of appeals on petitioner's direct appeal from his conviction.

While the previous rejection of identical claims by petitioner is a sufficient ground for denying relief under Section 2255 (*Laughlin v. United States*, 474 F. 2d 444 (C.A. D.C.), certiorari denied, 412 U.S. 941; *Dirring v. United States*, 370 F. 2d 862 (C.A. 1); *Meyers v. United States*, 446 F. 2d 37 (C.A. 2)), petitioner is, in any event, not entitled to any relief. Petitioner's allegations of governmental impropriety all involve his claim that he filed applications for extensions of time within which to file his return. Petitioner complains (Pet. 7-8) that the government's use of an exhibit showing that he had not applied for extensions unfairly damaged his credibility before the jury because he had lost his records for the years in question. But assuming that petitioner did in fact timely apply for extensions of time to file his income tax returns and that these applications were granted, petitioner would still not be entitled to relief. Petitioner stipulated at the trial that he did not file his tax returns for 1967 through 1971 until May 1973, after the Treasury agents' investigation had begun (R. 29). It is therefore clear that petitioner did not file any of the returns until long after the expiration of whatever extensions of time may have been granted and that any error in the testimony of government witnesses with respect to whether extensions were sought or granted was harmless.²

Indeed, if petitioner applied for extensions each year as he now claims, it necessarily follows that he was well aware of his obligation to file returns at the time they were due. Evidence of petitioner's contention would accordingly have strengthened the government's case with respect to the element of willfulness, *viz.*, that the repeated failures to file constituted "voluntary, intentional

²Petitioner has not asserted that the alleged extensions would have permitted the returns to be filed as late as May 1973.

violation[s] of a known legal duty." *United States v. Pomponio*, 429 U.S. 10, 12; *United States v. Bishop*, 412 U.S. 346, 360. There is accordingly no basis to set aside petitioner's conviction under Section 2255.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.